Office Supreme Court, U.S.
FILED
AUG 22 1983
ALEXANDER L. STEVAS,
CLERK

NO. 81-2149

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

NORMAN STUMES,

Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, SD 57501-5090
Telphone:(605) 773-3215
Counsel for Petitioner

TIMOTHY J. MCGREEVY
Dana, Golden, Moore
and Rasmussen
131 North Main Avenue
Sioux Falls, SD 57102
Telephone: (605) 336-1730
Counsel for Respondent

PETITION FOR CERTIORARI FILED APRIL 30, 1982
CERTIORARI GRANTED JULY 6, 1983

TABLE OF CONTENTS

	PAGE
RELEVANT DOCKET ENTRIES	1
STATE V. STUMES, 90 S.D. 382, 241 N.W.2d 587 (1976)	A-1
STUMES V. SOLEM, 511 F.Supp. 1312 (D.S.D. 1981)	A-21
APPLICATION FOR WRIT OF HABEAS CORPUS	A-74
PETITION FOR WRIT OF HABEAS CORPUS	A-86
RETURN TO WRIT	A-96
ORDER DENYING WRIT	A-101
MOTION ON REQUEST FOR STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT	A-103
ORDER [STAYING EXECUTION OF MANDATE OF EIGHTH CIRCUIT]	A-105
INFORMATION FOR MURDER	A-108
MOTION TO SUPPESS STATEMENTS	A-113
MOTION TO SUPPRESS EVIDENCE	A-115
AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS	A-119
ANSWER TO AFFIDAVIT AND MOTION TO SUPPRESS STATEMENTS	A-122

ORDER DENYING MOTON TO SUPPRESS A-124

FINDINGS OF FACTS AND CONCLUSIONS OF LAW A-126

JUDGMENT A-135

THE OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS, STUMES V. SOLEM, 671 F.2d 1150 (8th Cir. 1982), WAS REPRODUCED IN THE PETITION FOR WRIT OF CERTIORARI AND WILL NOT BE PLACED IN THE JOINT APPENDIX.

RELEVANT DOCKET ENTRIES

Docket Entry	Date
Application for Habeas Corpus	May 3, 1977
Petition for Habeas Corpus	May 3, 1977
State of South Dakota's Return to Writ	July 13, 1977
Petitioner's Motion for Evidentiary Hearing	September 21, 1977
Respondent's Resistance to Motion for Evidentiary Hearing	September 23, 1977
Affidavit of Petitioner in Support of Motion for Evidentiary Hearing	September 26, 1977
Evidentiary Hearing of October 6, 1977	October 6, 1977
Memorandum Decision	April 10, 1981
Order Denying Application for Writ of Habeas Corpus	May 5, 1981
Opinion of United States Court of Appeals	April 26, 1982
Mandate of United States Court of Appeals	April 26, 1982

#11470-rem-OPC

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

***

STATE OF SOUTH DAKOTA,

Plaintiff and Respondent,

vs.

NORMAN STUMES,

Defendant and Appellant.

***

APPEAL FROM THE CIRCUIT COURT
FOR THE FIRST JUDICIAL CIRCUIT
UNION COUNTY, SOUTH DAKOTA

***

THE HONORABLE WAYNE W. CHRISTENSEN
Judge

******

WILLIAM J. JANKLOW
Attorney General

MARC WEBER TOBIAS
Assistant Attorney General
Pierre, South Dakota

Attorneys for plaintiff and respondent.

JOE W. CADWELL of
BRAITHWAITE & CADWELL
Sioux Falls, South Dakota

Attorneys for defendant and appellant.

****

OPINION FILED MAY 6, 1976

COLER, Justice.

Appellant was charged with murder, SDCL 22-16-4, and found guilty of manslaughter in the first degree, SDCL 22-16-16, and he appeals. Appellant asserts as error (1) lack of foundation for admission of certain exhibits; (2) insufficiency of the evidence to support the verdict and (3) failure to suppress admissions against interest made by appellant to police officer.

> The information charged that appellant "on or about the 17th day of September, 1973 in the County of Minnehaha and State of South Dakota aforesaid then and there did wilfully, unlawfully, feloniously, without authority of law and with a premeditated design to effect the death of one Joyce Hoff, a human being, did kill the said Joyce Hoff, and the said Defendant did then and there, and by said means, commit the crime of murder in violation of the provisions of SDCL 22-16-4 * * *."

The victim in this case was found lying on her back on the floor beside her bed in

her apartment during the noon hour on Monday, September 17, 1973. When discovered the body of the victim was clad in a shorty nightgown and covered with a blanket. The county coroner of Minnehaha County, a pathologist, performed an autopsy on the body at approximately 1:45 p.m. on September 17, 1973. His external examination revealed a bruse on the victim's right cheek and cuts on the bridge of her nose and on her lips. Further examination revealed that a finely ribbed, plastic-type, spray can top, some one and three-fourths inches in diameter and in lengh, had been forced into the victim's vagina. The coroner concluded that the cause of death was not natural but was caused from a lack of oxygen, either anoxia or asphyxiation. There were no visible marks of strangulation nor were there any material signs of struggle in the apartment.

The coroner determined that the victim had had intercourse at some time between midnight and 2:00 a.m. prior to her death. He took samples of hair from the head and pubic areas of the decedent. Hairs from various portions of appellant's body, secured under a warrant, and pubic hair which was found to have adhered to the dried blood at the corner of the victim's mouth and certain other hairs which were discovered beneath the victim on her left buttocks were forwarded to the F.B.I. laboratory in Washington, D.C. for comparison.

Appellant has challenged the chain of evidence in respect to the handling of these exhibits at the F.B.I. laboratory. We have reviewed the record and find the showing of the chain of custody in the process used by the F.B.I. laboratory was sufficient to justify the admission in evidence of the

challenged exhibits under the standard enunciated by the court in State v. Christmas, 1968, 83 S.D. 506, 162 N.W.2d 125, and determine that that challenge is without merit.

Pursuant to the instructions given and to which no objection was made, the jury returned a verdict of guilty of manslaughter in the first degree. The instructions given, including one on the lesser included offense, manslaughter in the second degree, were essentially the text of South Dakota Pattern Jury Instructions (Criminal) 3-7-320, 3-7-320a, 3-7-320b, 3-7-320d and 3-7-320e, which are, as indicated in the notes accompanying the pattern instructions, statements gleaned from statute, SDCL 22-16-16, and decisions of this court. Appellant takes the position that the evidence adduced in the trial is not sufficient

to sustain a conviction under the language of the instruction.

The particular instruction which is meaningful for the purpose of our decision since it instructs on the law, particularly SDCL 22-16-16, is Instruction No. 14 reading as follows:

> "14. "The phrase 'in a cruel and unusual manner' as used in our law defining manslaughter in the first degree means that the commission of the homicide must be done with some excess of cruelty or refinement or unusual cruelty under the circumstances sufficiently marked to approach barbarity and to make it especially shocking, and the unusual character of the manner displayed in the killing must stand out as sufficiently unusual and unique or peculiar as to astonish and shock persons of normal sensibilities."

This instruction, the verbatim text of South Dakota Pattern Jury Instructions (Criminal) 3-7-320e, has as its genesis a statement appearing in State v. Lange, 1967, 82 S.D. 666, 152 N.W.2d 635, which, in turn borrowed

from both State v. Knoll, 1905, 72 Kan. 237, 83 P.622 and State v. Diggs, 1965, 194 Kan. 812, 402 P.2d 300, and from decisions of the New York courts, namely, People v. Vollmer, 1949, 299 N.Y. 347, 87 N.E.2d 291 and People v. Lee, 1950, 300 N.Y. 422, 91 N.E.2d 870. An analysis of these cases and on the other extreme, State v. Zemina, 1973, 87 S.D. 291, 206 N.W.2d 819 and State v. Pickering, 1973, 87 S.D. 331, 207 N.W.2d 511, points up that in each case the cause of death and the means by which the act was accomplished were clearly identifiable and involved, under varying circumstances, provocation and physical combatants. The facts of those cases we do not find controlling in this case.

Research of comparable law reveals that our vintage law, SDCL 22-16-16, carried forward from territorial days beginning in

Penal Code of 1877, § 250 and remaining unchanged, has had occasion to be construed by the courts of this state more frequently than like statutes of other states which have been abandoned for newer and more definitive classifications of homicide.[1]

While, contrary to his counsel's advice, appellant took the stand and related to the jury the series of events that led up to his presence in the decedent's apartment throughout the early morning hours of the day of her death, the jury need not have believed his version. He testified to having intercourse with the decedent with her consent and then, in a drugged sleep, having been unaware, except for momentary

---

[1] See N.D.C.C. § 12-27-17(2), repealed by Ch. 116, § 41, Session laws of 1973, cf. N.D.C.C. § 1-16-02; K.S.A. § 21-411, repealed, L. 1969, Ch. 180, § 21-4701, of K.S.A. § 21-3203; N.Y. Penal Law of 1909, § 1050, repealed, L. 1965, Ch. 1030, § 2, cf. N.W. Penal Law §§ 125.20, 125.25 (McKinney 1975).

wakefulness, that someone must have entered the apartment and killed Joyce Hoff. Both the version he presented to the jury and to the officers during interrogation would account for hair of characteristics like his own being found on the body of Ms. Hoff. His admissions that he had struck and choked the decedent with his hands does not explain her death as the coroner found no bruise marks on the neck which indicated to him that strangulation, which was the apparent cause of death, was accomplished by use of a cloth or like material which left no discernible mark.

The instruction properly set forth the law. The means used to cause death by strangulation and the duration and extremity of the assault upon the decedent might well be found by a jury to have been cruel and unusual, and indeed, inhuman, in fact. Hence,

the trial court was correct in submitting that phase of the issue to the jury. People v. Lee, supra.

Appellant's remaining claim is that certain admissions given by him to detectives of the Sioux Falls Police Department, Sergeant Green and Chief of Detectives Skadsen, while he was in their custody both in jail in Wisconsin and as a passenger in a motor vehicle with three law enforcement officers on the return trip to Sioux Falls from Wisconsin, were improperly admitted by the trial court. In keeping with State v. Thundershield, 1968, 83 S.D. 414, 160 N.W.2d 408 and State v. Kiehn, 1972, 86 S.D. 549, 199 N.W.2d 594, the trial court held a full evidentiary hearing on the suppression motion. The testimony at this hearing covers some 160 pages of the transcript and includes that both officers to whom the admissions were made and appellant himself

as to the circumstances which brought about the challenged admissions. As stated in State v. Thundershield, supra, and reiterated in State v. Kiehn, supra,

> "* * * it was the province of the judge to consider, reconcile any differences and decide therefrom if the [admissions], beyond a reasonable doubt, [were] voluntarily made under Miranda guidelines. As with other decisions of a trial court, we consider the evidence in the light most favorable to support it."

It would be impractical to detail the evidence produced at the suppression hearing but the essential facts before the trial court were that appellant was taken into custody in Green Bay, Wisconsin, on or about September 27, 1973, on unrelated felony charges pending in Minnehaha County, South Dakota. The two Sioux Falls detectives, previously named, and a Minnehaha County deputy sheriff went from Sioux Falls to

Green Bay to return appellant to South Dakota.

Appellant was represented by an attorney from Sioux Falls employed by his mother to represent him in the pending felony charges. No charges had been filed against appellant for murder although the officers acknowledged that he was a suspect. The attorney who had been hired to represent appellant advised one of the detectives that he had been in telephone contact with appellant in Wisconsin and that he had advised appellant not to talk but "that if he [the appellant] did there was nothing he [the attorney] could do about it."[2] On the

---

[2] We have also considered in this connection appellant's contention that since an attorney had been retained, albeit on other charges, the officers were barred from questioning appellant as a murder suspect. The logic of that position we cannot accept as comporting to the purposes of South Dakota Constitution Article VI, § 9 or as

morning of October 1, 1973, appellant was questioned for approximately one and one-half hours and again for approximately

---

required by Miranda v. Arizona, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974. We recognize the ultimate threat of such a holding in favoring those with means to retain counsel over those less fortunate, United States v. Masullo, 1973, 2 Cir., 489 F.2d 217, and agree with the New York court that, as here, where counsel had not been employed for the murder charge not then pending, that:

"once the police learn that an attorney has entered the proceeding, it is offensive to our system of justice, in the absence of a waiver, to permit further questioning by representatives of the People. Implicit in this rationale is the concept that the rule does not obtain unless and until the police or prosecutor learn that an attorney has been secured to assist the accused in defending against the specific charges for which he is held. It is, therefore, of no consequence that the law enforcement officials involved herein learned that an attorney had been assigned at the arraignment on the robbery charge since this attorney was in no way connected with the instant criminal proceeding." People v. Taylor, 1971, 27 N.Y.2d 327, 266 N.E.2d 630.

one-half hour in the afternoon in facilities provided by the Brown County, Wisconsin, sheriff's office. Officer Green's testimony, supported by Officer Skadsen, was to the effect that during the morning interrogation appellant had been given the Miranda warnings and that appellant had acknowledged that he understood those rights. During that same period, appellant admitted that he had been in the decedent's apartment the night of her death but made no admissions relative to his complicity in a crime. Later in the morning, in response to a question as to whether he would take a polygraph test he replied that he would not answer that question until he had talked to his attorney. The interrogation ceased at that point.

The two officers returned to the jail late that afternoon and continued questioning without restating the Miranda warnings.

Before the close of the afternoon questioning, Officer Green asked appellant if the death of Joyce Hoff was accidental or deliberate and appellant answered that it was accidental. Thereupon appellant stated he did not want to answer any further questions until he had talked to his attorney and no further conversation occurred that afternoon. On the return trip by car, after a restatement to appellant of his Miranda warnings, he began sobbing in the back seat and made the statement that "taking a human life is so useless." Subsequently, appellant recited some, but not all, of the events which took place leading up to the death of Joyce Hoff. In response to a question of whether or not he would sign a confession upon his return to Sioux Falls, he stated that he would and when advised by

the officers that his attorney would probably advise him not to, appellant was quoted as saying he "didn't give a damn what his attorney said; he could talk to anybody he wanted to." After being booked into the Minnehaha County jail, appellant called Captain Skadsen back to his cell and stated to Skadsen, in the presence of Green, "I want you to know that the death of Joyce [Hoff] was an accident. I'm not a vicious killer."

Appellant, although not denying he was given his statement of rights on two occasions, insisted that he had smuggled on his person some L.S.D. tablets and that at all times material to his being questioned had been taking one or two hits, tending to refute his being in a position to understand his rights or to exercise those rights intelligently.

At the conclusion of the evidentiary hearing the trial court denied from the bench appellant's motion to suppress the admissions. No formal order was entered as contemplated by RCP 7(b) (SDCL 15-6-7(b)) Neither the state nor appellant has challenged the lack of a "decision" on this motion. It is abundantly clear, however, that absent the necessary findings of fact and conclusions of law which make up a "decision" RCP 52(a); Bunnell v. Kindt, 1968, 83 S.D. 377, 159 N.W.2d 923, this court's review is seriously hampered, if not made impossible, because of the inability of this court to determine the credibility of the witnesses which determination is within the purview of the trial court before whom the witnesses appeared.

Under the authority of SDCL 15-26-26 and 15-30-2 and the precedent established by

State v. Faller, 1975, S.D., 227 N.W.2d 433, we may remand for further proceedings. To the same effect see State v. Iowa Dist. Court In & For Linn Cty., 1975, Iowa, 236 N.W.2d 54.

The total lack of findings of fact and conclusions of law in the present case causes us to remand this case for a determination of the factual issue upon the evidence previously adduced.[3]

---

[3] This court as well as the trial court must be wary of a mistaken construction of Westover v. United States, or Miranda v. Arizona 1966, both reported at 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 as was credited to the Michigan courts in Michigan v. Mosley, 1975, U.S., 96 S.Ct. 321, 46 L.Ed.2d 313.

Although appellant took the stand, there was no attempt made in this case to use the inculpatory statements for impeachment purposes. The admissions were used in the prosecution's case in chief so there is no factual setting here comparable to that found in Oregon v. Hass, 1975, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570, which should occasion either this court or the trial court to impose greater restrictions on

If any of the admissions admitted into evidence are found to have been involuntary from the "totality of the circumstances," State v. Adkins, 1975, S.D., 225 N.W.2d 598[4], a new trial shall be granted, but if

---

police activity than those the United States Supreme Court holds to be necessary under federal constitutional standards. Oregon v. Hass, supra.

In connection with this remand the trial court must consider the similarity of facts in the present case to those reflected in Williams v. Brewer, 8 Cir., 509 F.2d 227, cert. granted, 96 S.Ct. 561, Dec. 15, 1975, and as a further corollary in that case, the role that the trial court's findings of fact and conclusions of law have on appeal.

[4] It should be observed, as it was in Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618, that this court has adopted a strict standard of proof in this type of proceeding. We have said, by way of suggested procedure, that "[w]hen a confession or an incriminating statement allegedly made by the accused is offered by the prosecution and objected to the state has the burden of proving beyond a reasonable doubt the same was freely and voluntarily made." (emphasis supplied) State v. Thundershield, 1968, 83 S.D. 414, 160 N.W.2d 408, see also State v. Kiehn, 1972, 86 S.D. 549, 199 N.W.2d 594. Whether a less strict standard should be applied in light of recent developments in the law, we have not been asked to decide.

all such statements admitted as evidence are found to be voluntary, the judgment shall be affirmed. In either event the trial court shall make the "determination," as suggested by this court in State v. Thundershield, supra, reiterated more explicitly in State v. Kiehn, supra, and which we now hold is required. The determination requiring the entry of findings of fact and conclusions of law we equate with a "decision."

The cause is accordingly remanded for further proceedings.

DUNN, C. J., and WINANS and WOLLMAN, JJ. concur.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

CIV 77-4049

Norman Stumes,

Petitioner

vs.

Herman Solem,

Respondent

MEMORANDUM DECISION

Mr. Edward J. Leahy, of May, Johnson, Doyle & Becker, of Sioux Falls, South Dakota, appeared in behalf of the petitioner;

Ms. Judith A. Atkinson and Ms. LeAnn Larson Finke, Assistant Attorneys General, of Pierre, South Dakota, appeared in behalf of the respondent.

Petitioner, Norman Stumes, seeks a writ of habeas corpus pursuant to 28 U.S.C. 2254. Petitioner alleges that his confinement under the custody of Herman Solem, Warden of the South Dakota State Penitentiary, is based on a conviction in state court for first degree manslaughter that was the result of proceedings that deprived him of his fifth, sixth, and fourteenth amendment rights. Specifically, the petitioner alleges that the state proceedings were constitutionally invalid for the following reasons:

I.

Petitioner was denied his constitutional right to counsel.

II.

The admission into evidence of strands of hair from the victim, the petitioner, and

unidentified hair found on the victim, without sufficient foundation, deprived petitioner of due process of law.

III.

Petitioner's rights to due process of law was violated when the trial court submitted to the jury the question of guilt as to first degree manslaughter over the petitioner's objection.

FACTS AND PROCEDURAL HISTORY

On September 17, 1973, the body of Joyce Hoff was discovered in her apartment at Sioux Falls, South Dakota. She was the apparent victim of a homicide. The policeman investigating the crime described the body as follows:

> I observed a woman that was mostly nude. She had on a light greenish . . . turquoise . . . pair of . . . baby doll pajamas. The bottoms had been ripped mostly off and (were) lying . . . on her left side. The upper part of this night ensemble had been torn and ripped and was lying . . . upon her . . . left shoulder.

The Minnehaha County Coroner performed an autopsy. His external examination revealed that the deceased had a bruised and swollen eye, a round bruise on her cheek, and small scratches and bruises on the bridge of her nose and on her lips. There were also small hemorrhages in the eyes and a discoloration of the neck and face. Further examination revealed that a plastic spray can top had been forced into the victim's vagina.

The Coroner concluded that the cause of death was not natural, but due to a lack of oxygen--either anoxia or asphyxiation. There were, however, no visible marks of strangulation. The Coroner also concluded that the victim had engaged in sexual intercourse sometime between midnight and 2:00 A.M., prior to her death.

During the course of the investigation conducted by the Sioux Falls Police Department, petitioner became one of the suspects. At the time of the investigation petitioner had reckless driving, perjury, and felony check charges pending against him. He was represented on the reckless driving charge by Steve Jorgensen, a Sioux Falls lawyer who had previously represented the petitioner on other matters.

The fact that the petitioner was being sought by the police came to the attention of petitioner's mother, Jean Hamilton. In light of this fact and Mrs. Hamilton's feeling that petitioner had not been treated fairly in previous contacts with police, she contacted Steve Jorgensen relative to retaining him to represent petitioner. She paid Jorgensen $500.00 and he agreed to represent the petitioner. There were, however, no formal charges pending at this

time against the petitioner with respect to the Hoff homicide.

Shortly after accepting the retainer, Jorgensen contacted Don Skadsen, Chief of Detectives, Sioux Falls Police Department, to inform them that he was aware that they were looking for petitioner. Jorgensen testified at the evidentiary hearing that the conversation was as follows:

> (t)hat in all probability, if Norman (petitioner) contacted anyone, he would probably contact me inasmuch as I had represented him in the past, and that I would make a sort of deal with them (police) that if Norman contacted me first, that I would persuade him to surrender himself for questioning, if they would agree that if they found him first, they would contact me and let me talk to him before they began questioning him.

Mr. Jorgensen further testified that the agreement that he had with the police was "with respect that they would contact me if they found him before I did." "They kept their part of the obligation as far as I was

concerned," Jorgensen said; "there wasn't any agreement whatsoever, either express or implied, concerning the scope of questioning that was permissible on the trip from Green Bay to Sioux Falls."

On September 27, 1973, petitioner was arrested in Green Bay, Wisconsin, on the perjury and felony check charges. He was informed that he was under arrest for Sioux Falls authorities, searched, and given his Miranda rights. He was then placed in the Brown County, Wisconsin, jail.

Subsequent to petitioner's arrest and prior to the transporting of petitioner back to South Dakota, Jorgensen was contacted at home by Detective Skadsen to advise him that petitioner had been arrested in Green Bay. Jorgensen then attempted to contact the petitioner at the Brown County Jail. Because of the late hour and the fact that the

person on duty was alone, petitioner could not be brought to the phone. Jorgensen was assured, however, that they would have petitioner call him in the morning. At 7:00 A.M. the next morning petitioner called Mr. Jorgensen. Jorgensen told petitioner "that he was wanted for questioning on a homicide. . ."

> I told him not to talk over the telephone about it, that he should not make any statements to anybody in law enforcement, that he had a right to remain silent, and that he should not make any statements until he had been returned to Sioux Falls and discussed the matter with me.

Later on that week and shortly before Skadsen and Sergeant James Green were to leave for Green Bay, Green and Jorgensen had a chance meeting outside the police department. Jorgensen informed Green that he had told the petitioner not to talk to the Sioux Falls police officers, but then added, "knowing you, you'll have a confession out

of him before you get him back to Sioux Falls." Jorgensen, however, indicated during his testimony at the evidentiary hearing that the remark "certainly wasn't in a serious vein and it wasn't intended to indicate to the detective that he had the okay to take a confession from my client." Green's testimony at the suppression hearing prior to petitioner's trial in state court was that Jorgensen had told him that "he'd talked to Norman on the telephone . . . and had advised him not to talk to us but he stated that if he did talk to us there wasn't anything he could do about it."

On September 30, 1973, Skadsen and Green flew to Green Bay for the purpose of transporting petitioner back to Sioux Falls on the perjury and felony check charges as well as to question him about the death of Joyce Hoff. On the same date, Minnehaha

County Deputy Sheriff Hendrick drove a sheriff's automobile to Green Bay to be used in returning petitioner to Sioux Falls.

On October 1, 1973, at approximately 9:30 A.M., Green, Skadsen, and Hendrick went to the Brown County Jail. After petitioner executed a consent form for the search of his car and residence he was transported to the Green Bay Police Department for questioning. Skadsen, Hendrick, and Lieutenant Milton Steeno of the Green Bay Police Department left to search petitioner's car and room. Green remained behind to question petitioner. At approximatley 10:00 A.M. petitioner was advised of his rights. After his rights were read to him, petitioner stated that he understood his rights and that he had no objection to speaking to officers without the presence of counsel.

During the next hour and one-half the subject of the Joyce Hoff homicide was discussed. At no time did petitioner make any statements implicating himself in the Hoff homicide. At approximately 11:45 A.M. Green advised petitioner that various people in Sioux Falls had taken polygraph examinations relative to the homicide. He then asked petitioner if he would be willing to do so. Petitioner stated, "that is a question I'd rather not answer until I talk to Steve." Questioning ceased at this point, but petitioner was told that the officers would again visit with him in the afternoon. Petitioner was then returned to the county jail at approximately 11:45 A.M.

At about 4:30 P.M. both detectives returned to talk to petitioner. No Miranda warning was given at this time. Petitioner was asked about certain evidence that the

detectives had that placed petitioner in Joyce Hoff's apartment on the day of her death. Petitioner did admit being in decedent's apartment on September 17 and admitted having intercourse with her at that time. He denied, however, any involvement in her death. After approximately one-half hour of questioning Green asked petitioner if Joyce Hoff's death was intentional or accidental. Green and Skadsen both testified that petitioner responded by saying it was accidental. Petitioner then stated, "I would rather not talk about it any more at this time until I talk to my attorney, and after that I'll give you a full statement in regards to her death." The questioning immediately ceased.

The following morning Skadsen, Green, and Hendrick arrived at the county jail at

approximately 9:00 A.M. to pick up petitioner and transport him back to Sioux Falls, a distance of over 600 miles.

Shortly after the trip began petitioner was informed of his Miranda rights and was asked if he understood them. He indicated he did. Petitioner was then asked if he was willing to talk to them. Petitioner, according to Skadsen and Green's testimony, shrugged his shoulders and nodded his head forward.

Petitioner was then questioned about the death of Joyce Hoff. According to Skadsen, "we discussed basically the same questions that were discussed the previous afternoon at the sheriff's office." This discussion lasted about 15 or 20 minutes and then the conversation switched to other matters such as the weather, car racing, petitioner's trip to Green Bay, and the Green Bay Packers.

This is confirmed by petitioner's testimony in which he classified the discussion in the car as follows:

Q: "Do you recall any interrogation that morning?"

A: "Not directly interrogation. There were some statements made."

During the trip back to Sioux Falls several stops were made including two or three stops for gas and refreshments and about 250 miles from Green Bay a stop for lunch. After lunch Skadsen and Green changed places.

After eating and resuming the trip petitioner classified the discussions that took place as follows:

Q. "Do you recall any interrogation after you had eaten?"

A: "No, I don't think there was any interrogation right after we ate. There was a general conversation."

Then, according to Skadsen and Green's testimony, approximately 90 miles from Sioux Falls, petitioner started crying and said, "taking a human life is so useless." This is confirmed by petitioner who described the scene this way: "Somewhere between Jackson and Worthington . . . I had a little conflict with my emotions and I made the statement that I couldn't understand why anybody would want to kill Joyce amd that the taking of a human life is so useless." Petitioner was then asked and testified as follows:

> Q: "Do you recall, was there any interrogation going on at that time. . . .?"
>
> A: "No, I don't believe so. There hadn't -- I don't think there was any conversation in the car for maybe 10 or 15 minutes."

Green then told petitioner he would feel much better if he "got it off his chest."

Petitioner then stated that he'd been wanting to tell somebody, but he just didn't know how to go about it. Then, according to Skadsen and Green's testimony, petitioner related how he had killed Joyce Hoff on September 17, 1973. According to the testimony of Green, petitioner stated that:

> On the early morning of the 17th day of September he'd been at the Mocamba Club, left there at approximately eleven-thirty in the evening, he'd gone home and dropped two tabs of acid, and decided that he wanted to talk to Joyce Hoff in regards to Sierri White. He stated he drove up to Joyce's apartment, parked his car in front of the victim's car -- and this was about one A.M. in the morning -- and he stated that he up and knocked on the door, and she asked who it was, and he identified himself. She asked what he wanted, and he stated he had to talk to her about Sierri White, and she let him in. He said he walked over and sat on the davenport, and she sat down with him, and he started to cry, and he said he couldn't stop. He said that this went on for about 15 minutes. He stated that Joyce got up and said, 'Norman, we'll talk about it when you feel better,' and

she went into the bedroom. He stated that he sat there for about another five minutes, and was still crying, and he walked into the bedroom, and she got up and put her arm around him and tried to comfort him, and one thing led to another and he disrobed her and they had intercourse on the bed, and he said after that they got up and dressed, and she told him at that time that she was going to tell Sierri White what had happened. He said that he begged with her and pleaded with her not to tell her, and she wouldn't change her mind. He stated that at that time he was standing at an angle a little bit to her right, and he said he thought he struck her in the right cheek with his right fist, and she went down to the floor, and he stated that he strangled her with his hands. He stated that after that -- I asked him at that time if he thought that Joyce Hoff was dead at the time he got up, and he stated, "I believe she was. She wasn't breathing." He stated that he covered her up with some blankets. He went down to his car, and got a screwdriver, came back upstairs and took the lock off of the door to make it look like a burglary. He stated that he took $6.00, the lock, and a towel from the house, and left. He stated that the next thing he remembered he woke up at home about two p.m. that afternoon.

Skadsen then asked petitioner how Joyce Hoff was dressed. Petitioner indicated that she had on a full length housecoat and light blue baby doll pajamas. Skadsen asked if the bottoms matched the top and petitioner said he believed they did. Skadsen then stated that there was a foreign object found in the vagina area and asked petitioner if he had placed it there. Petitioner indicated he didn't remember but he might have. Green then asked if petitioner would be willing to give the police a statement when they got back to Sioux Falls. Petitioner indicated that he would. It was at this point that the following exchange took place according to the testimony of Green and Skadsen:

Q: "Your attorney will undoubtedly advise you not to give one (statement)."

A: "I don't give a damn what he says. I'm doing anything I feel like, and I'll talk to anybody I want to."

According to Skadsen and Green's testimony that was the first time during the day that petitioner had mentioned his attorney.

The officers and petitioner arrived at the Minnehaha County Jail in Sioux Falls, at approximately 6:45 P.M. Shortly after the petitioner had been placed in his cell he informed the jailer that he wanted to talk with Skadsen again. According to Skadsen's testimony petitioner was crying again and put his head on Skadsen's shoulder and said, "please tell them that I didn't mean to kill her, that it was an accident--that I'm not a vicious killer."

Petitioner was thereafter formally charged with the murder of Joyce Hoff. Counsel was appointed because of his indigency. A suppression hearing was held at which petitioner requested that the court suppress all of the admissions on the

grounds that his constitutional rights had been violated. The motion was denied.

At trial, both Skadsen and Green testified relative to petitioner's admissions and petitioner was convicted by a jury of first degree manslaughter and sentenced to a term of life in the South Dakota State Penitentiary.

An appeal to the South Dakota Supreme Court was perfected on May 2, 1974. On May 6, 1976, the South Dakota Supreme Court remanded the conviction because of the absence of necessary findings of fact and conclusions of law in support of the order denying the motion to suppress. The Supreme Court instructed the trial court that if the admissions admitted into evidence are found to have been involuntary from the "totality of the circumstances" . . . a new trial shall be granted, but if all such statements

admitted . . . are found to be voluntary, the judgment shall be affirmed. In either event the trial court was given the authority to make the determination. The Supreme Court went on to say that, "the determination requiring the entry of findings of fact and conclusions of law we equate with a decision." State v. Stumes, 241 N.W.2d 587 (S.D. 1976).

Accordingly, the trial court on October 18, 1976, entered findings of fact and conclusions of law specifically finding that, "(T)he State of South Dakota has met its burden of proof beyond a reasonable doubt by showing that the defendant knowingly, voluntarily, and intelligently waived his request for counsel and any other constitutional right which he possessed at the time when he gave incriminating statements to any law enforcement officers." The

conviction was therefore automatically affirmed. Petitioner is currently serving his sentence under the custody of the State of South Dakota.

Petitioner's application for a writ of habeas corpus was filed with this Court on May 3, 1977. All claims raised by petitioner in this Court have been raised and decided on appeal by the South Dakota Supreme Court. State v. Stumes, supra. It is not required that petitioner seek further state post conviction review of those issues. U.S. ex rel. Ted Means v. Solem, 480 S.Supp. 128 (D.S.D 1979), aff'd slip opinion 79-2017 (8th Cir. 6-27-80), Eaton v. Wyrick, 528 F.2d 477 (8th Cir. 1975), United States ex rel. Russell Means v. Solem, 457 F.Supp. 1256 (D.S.D. 1978), Orricer v. State, 85 S.D. 293, 181 N.W.2d 461 (1970).

This Court held evidentiary hearings on October 6, 1977, and May 19, 1978, to more fully develop the factual dispute surrounding petitioner's Fifth and Sixth Amendment claims. At the request of petitioner an additional hearing was held on December 19, 1980, for the purpose of supplementing the record by receiving into evidence police reports that had been in petitioner's possession but were not introduced at the prior evidentiary hearings. The State resisted the request to supplement the record.

The existence of newly discovered evidence would justify holding an evidentiary hearing. Austin v. Swenson, 522 F.2d 168 (8th Cir. 1975). The holding of a hearing, if not mandated, is within the sound discretion of the District Judge. Townsend v. Sain, 372 U.S. 294 (1963), Martin v. Beto, 397 F.2d 741 (5th Cir. 1968), cert. denied, 394 U.S. 906 (1960), 6A

Moore's Federal Practice, 2d Ed. section 59.04 (13), Advisory Committee Note, Rule 8, Rules Governing Section 2254 Cases in United States District Courts. Therefore, this Court grants petitioner's request to supplement the record and the police reports are received into evidence at this time.

In addition to the evidentiary hearings, this Court has examined the original and supplemental (post Rhode Island v. Innis, 100 S.Ct. 1682 (1980)) briefs that have been submitted. This Court has also received and studied the entire transcript, including the preliminary hearing, suppression hearing, and the trial itself.

Under 28 U.S.C. section 2254(d), a federal court has only limited power to reject a determination of a factual issue made by a state court after a hearing on the merits. See also, Sumner v. Mata, 49 L.W.

4133 (January 21, 1981). The statute provides that unless petitioner establishes, or the state admits, one of seven factors, the state determination of a factual issue shall be presumed to be correct. 28 U.S.C. section 2254(d). Alternatively, the state court's factual determination may be rejected if it is not fairly supported by the record. If none of these factors are established, the presumption of correctness applies and can only be overcome by "convincing evidence." Sumner v. Mata, supra.

As Justice Rehnquist declared in Sumner v. Mata, supra,

> The very nature of habeas practice in recent decades makes the friction between the state and federal court systems inevitable. But that friction can be reduced, and section 2254(d) represents Congress' attempt to do just that. Congress meant to insure that state courts' factual findings would not be overturned by a federal court merely on the basis of the "preponderance of the evidence" standard.

This Court on October 6, 1977, entered an order granting petitioner's request for an evidentiary hearing. The order granted the hearing "for the purpose of taking evidence to develop material facts which were not adequately developed at the state court hearing . . . ." This order was based in part on petitioner's affidavit indicating that he wanted to call Steve Jorgensen, the lawyer that was retained by petitioner's mother after petitioner became a suspect in the Hoff homicide. It was this Court's belief that Mr. Jorgensen's testimony was necessary to adequately develop the facts essential to a determination of whether petitioner's constitutional rights were violated.

At the evidentiary hearing testimony from Mr. Jorgensen and Mr. Gene Paul Kean, Minnehaha County States Attorney at the time of the Hoff homicide, was presented. Neither

of these persons testified at trial. Additionally, police reports not presented at trial were received into evidence by this Court.

Therefore, it is the finding of this Court that petitioner has established, pursuant to 28 U.S.C. 2254(d)(3), by convincing evidence, (the testimony of Mr. Jorgensen, Mr. Kean, and the police reports), that material facts were not adequately developed at the state court hearing and the presumption of correctness does not apply. See Sumner v. Mata, supra.

This Court, however, need not shut its eyes to the state's consideration of such issues. Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1952).

Accordingly, while this Court does not afford a presumption of correctness to the state court's factual determination, it does

take cognizance of the fact that both the trial judge and the jury passed on the credibility of various witnesses. Therefore, this Court resolves the disputed facts as set out above.

PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL

The constitution of the United States guarantees individuals a right to the assistance of counsel through the provisions of the Fifth and Sixth Amendments. (U.S. Const., amend. V & VI). The Sixth Amendment guarantees the right to legal representation at trial and at various pretrial stages of criminal prosecutions. Argersinger v. Hamlin, 407 U.S. 25 (1972), Gideon v. Wainwright, 372 U.S. 335 (1963), Powell v. Alabama, 287 U.S. 45 (1932); but see Scott v. Illinois, 440 U.S. 367 (1979). The Fifth Amendment, while not explicitly guaranteeing a right to counsel, has been interpreted to

secure a right to legal assistance during custodial interrogation conducted before the filing of formal criminal charges. Miranda v. Arizona, 384 U.S. 436 (1966).

The policies underlying these two constitutional protections are quite distinct. See Rhode Island v. Innis, 100 S.Ct. 1682 (1980, Edwards v. Arizona, No. 79-5269, argument of counsel before United States Supreme Court, 49 L.W. 3399 (December 1980). Therefore, this Court examines separately petitioner's Fifth and Sixth Amendment claims.

SIXTH AMENDMENT

The Sixth Amendment right to counsel safeguards the "fundamental rights of life and liberty." Johnson v. Zerbst, 304 U.S. 458 (1930). At trial, the aid of counsel protects an accused against "convictions resulting from his own ignorance of his

constitutional and legal rights." Id. at 465.

The Sixth Amendment also affords an accused the assistance of counsel before trial, during "critical stages" of the prosecution. United States v. Wade, 388 U.S. 218 (1967). A stage is critical and implicates the Sixth Amendment right to counsel when the government confronts the accused in a manner such that the aid of counsel is necessary to preserve the accused's right to a fair trial, to the effective assistance of counsel at trial, and to meaningful cross examination of witnesses. Id. at 227.

The United States Supreme Court extended the Sixth Amendment "backwards" in Hamilton v. Alabama, 368 U.S. 52 (1961) and Massiah v. United States, 377 U.S. 201 (1964), to guarantee the right to counsel to

an individual confronted by the government at adversary judicial proceedings before trial. See also Kamisar, Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?, 67 Geo L.J. 1 (1978).

A further extension "backwards" occurred in Escobedo v. Illinois, 378 U.S. 478 (1964). Under the Court's analysis in Escobedo the individual's Sixth Amendment right to counsel attached because the "focus" of the government's inquiry shifted from investigatory to accusatory and the government's purpose in questioning the suspect was to elicit incriminating statements. See Enker & Elsen, Counsel for the Suspect; Massiah v. United States and Escobedo v. Illinois, 49 Minn.L.Rev. 47 (1964). The Escobedo opinion left lower courts struggling with the notions of "focus" and "purpose" which were not defined "except by reference to each other and the Escobedo facts." Id. at 70.

Then in Miranda v. Arizona, decided on Fifth Amendment grounds, the Court explained that "police custodial questioning" was what Escobedo meant by "focus". 384 U.S. at 444, n. 4. Thus, although Miranda reaffirmed Escobedo's principle that suspects under interrogation are entitled to the assistance of counsel to assure effectuation of their Fifth Amendment privilege, Miranda effectively displaced Escobedo's rationale by assigning protection of the privilege to a newly created Fifth Amendment right to counsel rather than to the right to counsel secured by the Sixth Amendment. Kamisar, supra at 26. Then, in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), the Court construed its earlier Sixth Amendment decisions to establish the principle that an accused "need not stand alone against the

state at any state of the prosecution, formal or informal, where counsel's absence might derogate from the . . . right to a fair trial." The Court indicated it would "scrutinize any pretrial confrontation" to determine whether the presence of counsel was "necessary to preserve the defendant's basic right to a fair trial." United States v. Wade, supra at 227.

Finally, in Kirby v. Illinois, 406 U.S. 682 (1972), in an opinion by Justice Stewart, a plurality of the Court declared that the Sixth Amendment right to counsel only attached "at or after the initiation of formal judicial proceedings can be commenced not only by way of indictment, but also "by way of formal charge, preliminary hearing . . . , information, or arraignment." Id.

This "notified indictment rule" seems now to be firmly established, Moore v. Illinois, 434 U.S. 220 (1977), Brewer v.

Williams, 430 U.S. 387 (1977), United States v. Ash, 413 U.S. 300 (1973), Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers, 60 B.U.L.Rev. 738 (1980), Grano, Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions, 17 Am.Crim.L.Rev. 1 (1979), Kamisar, supra at 83.

In the present case petitioner was not under indictment and had not been charged with anything relating to the Joyce Hoff homicide. Petitioner had been arrested as a suspect in the Hoff homicide and for perjury and felony check charges which were pending against him. His claim, however, of a Sixth Amendment constitutional rights violation relates only to the Hoff homicide questioning. Therefore, it is the opinion of this Court, based on the analysis set out above,

that petitioner's Sixth Amendment right to counsel had not attached because adversary judicial proceedings in the form of indictment, formal charge, preliminary hearing, information, or arraignment in the Hoff homicide had not been commenced. Thus, petitioner's Sixth Amendment right to counsel was not violated.

FIFTH AMENDMENT

The Fifth Amendment right to counsel attaches and comes into play when an individual is subjected to custodial interrogation because at such times the privilege against compelled self-incrimination is jeopardized. Miranda v. Arizona, supra at 477-78. Custodial interrogation was defined by the Court in Miranda as "questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444.

Most recently, in Rhode Island v. Innis, 100 S.Ct. 1682 (1980), the Court further defined the term "interrogation" by holding that under Miranda, interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police know are reasonably likely to elicit an incriminating response from the suspect."

Petitioner in this case was questioned on three occasions: the morning of October 1, the afternoon of October 1, and during the car trip back to Sioux Falls on October 2.

There is little doubt that the questioning on October 1, both the morning and afternoon sessions, was custodial interrogation. Whether the conversations in the car on October 2 were interrogation presents a

slightly closer question. This Court is convinced, however, that although petitioner classified the questioning in the car as statements and conversation, the questioning that took place was custodial interrogation as defined in Miranda and Innis. Therefore, any information obtained during these Miranda interrogations is inadmissible at trial unless petitioner waived his right to the assistance of counsel.

WAIVER

Permitting waiver of the right to counsel afforded by the Fifth and Sixth Amendments cuts against the Supreme Court's consistent recognition of the fundamental importance of counsel in the Constitution's scheme of justice. See Faretta v. California, 422 U.S. 806 (1975). Nevertheless, the Court has long sanctioned waiver of the right to counsel noting that the "notion of compulsory counsel was utterly

foreign" to the framers of the Constitution. Id., Johnson v. Zerbst, 304 U.S. 458 (1938). In Johnson the Court established that "intentional relinquishment or abandonment of a known right or privilege" constitutes a valid waiver.

The Supreme Court in recent years, however, had developed a standard for waiver of the Fifth Amendment right to counsel which is less stringent than the standard for Sixth Amendment waivers.

In Fifth Amendment cases the Court seeks to ensure that statements obtained through the interrogation process are voluntary and not the product of coercion. The Miranda Court stated that the provision of the warning and relinquishment of the rights it delineated were "absolute prerequisites" to interrogation. The Court, however, clearly indicated that it did not intend to prohibit all police questioning conducted in

the absence of counsel. Miranda v. Arizona, supra at 477-78. Rather, waiver of Fifth Amendment rights was possible once police had made those rights sufficiently known within the Johnson v. Zerbst framework. The Court acknowledged that an express indication of a desire to waive the Miranda rights followed closely by a statement could satisfy the relinquishment component for waiver. Id. at 475.

Recent decisions in Tague v. Louisiana, 444 U.S. 469 (1980) (per curiam), and North Carolina v. Butler, 441 U.S. 369 (1979), make clear that a suspect must affirmatively indicate that he comprehends the rights described to him in the warnings. He may then waive his Fifth Amendment rights by continuing to talk even though he does not "expressly state as much." North Carolina v. Butler, supra at 374, n.4. Thus, the government can satisfy the Johnson v. Zerbst

requirement for waiver of counsel in the context of a Miranda interrogation by proving that the suspect was informed of and comprehended his Fifth Amendment right to counsel.[1]

This Court now turns to an analysis of each of the custodial interrogation sessions to determine if petitioner waived his Fifth Amendment right to counsel.

---

[1] The Court has also articulated the general Johnson v. Zerbst formulation in the context of waiver of the Sixth Amendment right to counsel. Faretta v. California, 422 U.S. 806 (1975). Unlike waiver of the Miranda right to counsel, which requires simply comprehension of the right itself, waiver of the Sixth Amendment right to counsel requires comprehension of the risks of waiving the right and facing trial without counsel. Id. at 835.

The holdings of Williams and Butler also indicated that different standards govern the relinquishment of the Fifth and Sixth Amendment rights to counsel. See Grano, supra at 35, n. 215. The notion that the same waiver standard should apply in both the Fifth and Sixth Amendment right to counsel cases was advanced by Justice White

OCTOBER 1, 1973
MORNING

Shortly after Green and Skadsen arrived to interrogate petitioner he was advised of his Miranda rights, indicated that he understood them and that he had no objection to speaking to officers without the presence of counsel. Petitioner did not make any incriminating statements during this morning session. It should be noted, however, that

---

and rejected by the Court in Williams. Williams v. Brewer, supra at 435 , n.5 (White, J. dissenting). The fact that the Butler Court did not cite Williams further suggests that different waiver standards apply in the Fifth and Sixth Amendment contexts. See also Edwards v. Arizona, argument of counsel, 49 L.W. 1087, 3399 (1980).

In any event, since this Court has previously held that the Sixth Amendment right did not attach, only waiver in a Fifth Amendment context will be discussed further.

late in the morning session, petitioner, in response to a question on taking a polygraph examination stated, "that is a question I'd rather not answer until I talked to Steve." Questioning immediately ceased and petitioner was returned to his cell at approximately 11:45 A.M. It appears from this that petitioner was informed of and comprehended his Fifth Amendment right to counsel and that the requirements of Miranda, Tague and Butler were satisfied. Therefore, this Court finds there was not a violation of petitioner's Fifth Amendment right to counsel at the morning session. Additionally, since petitioner did not make any incriminating statements at the morning session, further analysis is not necessary. The morning session remains relevant in the context of the "totality of the circumstances surrounding the interrogation." Fare v. Michael C., 442 U.S. 707 (1979).

OCTOBER 1, 1973
AFTERNOON

At approximately 4:30 P.M. Green and Skadsen returned to question petitioner. No Miranda warning was given at this time. The only possible incriminating statement made by petitioner at this session, however, was when petitioner was asked if Joyce Hoff's death was intentional or accidental. Petitioner indicated it was accidental and that he would rather not talk about it any more until he had talked with his attorney. Questioning of petitioner ceased.

The state contends that the warnings from the morning session carried over to the afternoon session and that a fresh set of Miranda warnings need not be given every time a question is asked. While this Court agrees that a new set of warnings need not be given every time a question is asked, it

does feel that petitioner, at a minimum, should have been readvised of his rights before questioning was resumed at this afternoon session. United States v. Gay, 522 F.2d 429 (6th Cir. 1975), United States v. Collins, 462 F.2d 792 (2d Cir. 1972), United States v. Jackson, 436 F.2d 39 (9th Cir. 1970), Kamisar, supra at 72. Therefore, since this statement was admitted at trial, this Court must determine whether failure to exclude was reversible or harmless constitutional error under Chapman v. California, 386 U.S. 18 (1976), and Fahy v. Connecticut, 375 U.S. 85 (1963). All trial errors which violate the constitution do not automatically call for reversal. Id. Constitutional error that "affects substantial rights" of a party should not be treated as harmless. Chapman v. California, supra at 23. Because the statement obtained

in the afternoon session and admitted into evidence was, at worst only marginally inculpatory and because of the existence of substantial other evidence on which to base a conviction, this Court holds that the admission into evidence of petitioner's statement obtained in the afternoon session was harmless beyond a reasonable doubt. There is sufficient evidence, beyond a reasonable doubt, to conclude that the constitutional error did not contribute to the conviction in any significant way. Id. at 24.

OCTOBER 2, 1973

Petitioner was picked up at the county jail the morning of October 2 for the purpose of transporting him back to Sioux Falls, a distance of some 600 miles. Petitioner was informed of his Miranda rights and indicated he understood them. He

was then asked if he was willing to talk to police officers. Petitioner indicated he was willing by nodding his head forward. Questioning was then resumed for a period of about 20 minutes. Later that same day, however, but not in response to any questioning, petitioner made several statements (which were previously set forth in the facts) that were highly inculpatory and formed the primary basis of his conviction. The Court's inquiry now becomes whether this resumption of questioning violated petitioner's constitutional rights.

In Miranda the Supreme Court stated:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without

> the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice and producing a statement after the privilege has been once invoked.

384 U.S. at 473-74.

Subsequent to Miranda, however, the Supreme Court decided that neither this passage nor any other passage in Miranda created a per se proscription of indefinite duration upon further questioning by police. Michigan v. Mosley, 423 U.S. 96 (1975). See also United States v. Marchildon, 519 F.2d 337 (8th Cir. 1975), and Hughes v. Swenson, 452 F.2d 866 (8th Cir. 1971).

The Court in Mosley stated that:

> Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting.

> We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was scrupulously honored.'

Thus, Mosley stands for the propositions that interrogation may be resumed, at least in some limited circumstances. Michigan v. Mosley, supra at 106.

While this Court feels it presents a close question whether defendant's Fifth Amendment right to counsel was violated by the resumption of questioning, it holds that the resumption of questioning on October 2 during the trip back to Sioux Falls did not violate petitioner's constitutional rights because of the presence of the following factors:

> -previous interrogations were promptly terminated and petitioner's right to cut off questioning was 'scrupulously honored;'

-the questioning was resumed only after the passage of a significant period of time;

-petitioner was given the full and complete Miranda warning at the outset of the questioning on October 2 and said he understood them;

-petitioner when asked if he was willing to talk to a police officer indicated a willingness to do so;

-petitioner did not at any time on October 2 assert or indicate that he did not want to talk to police officers or wanted to consult with counsel;

-the questioning on October 2 took place during an automobile trip and not in the police dominated atmosphere of a police station;

-petitioner was not being questioned at the time he made his incriminating statements, he volunteered them; [2]

-petitioner expressly waived his Miranda rights at one point by stating, "I don't give a damn what he says (his attorney). I'm doing anything I feel like and I'll talk to anybody I want to;"

-petitioner had been informed of his rights on several previous occasions, including by his attorney, and understood them as demonstrated by his previous invocations of his right to counsel and to cut off questioning;

---

[2] Petitioner did not classify any of the questioning that took place on October 2 as interrogation. Rather, he referred to the questioning as statements and conversation. If it is not considered interrogation in the eye of the beholder (petitioner), it is difficult to imagine that the "coercive pressure of the custodial setting" was present within the meaning of Miranda.

-petitioner was knowledgeable of his constitutional rights from previous contacts with the criminal justice system;

-petitioner had consulted with his attorney and had been advised not to talk to law enforcement officers or make any statements until he was returned to Sioux Falls. Despite this advice from his own attorney, petitioner voluntarily chose to talk to law enforcement officers; and

-after the completion of the trip, petitioner called Skadsen to his cell and again made voluntary statements concerning the homicide.

It is the holding of this Court that the statements made by petitioner and obtained through the interrogation process on October 2, 1973, were voluntary and not the

product of coercion. Petitioner was informed of and comprehended the rights described to him in the Miranda warnings and waived, both expressly and impliedly from the totality of the circumstances surrounding the interrogation, his Fifth Amendment right to counsel. Tague v. Louisiana, supra, Fare v. Michael C., supra, and North Carolina v. Butler, supra.

II.

OTHER CLAIMS

Petitioner also claims that his right to due process was violated by the admission into evidence of certain exhibits without proper foundation and that there was insufficient evidence to submit to the jury the charge of first degree manslaughter.

This Court finds petitioner's lace of foundation claim unpersuasive and without merit.

With respect to petitioner's sufficiency of the evidence claim this Court applied the test set out in Jackson v. Virginia, 99 S.Ct. 2781 (1979), and finds that any rational trier of fact could have found the petitioner guilty beyond a reasonable doubt. See Jackson v. Virginia, The Advent of the Reasonable Doubt Standard in Habeas Corpus Proceedings, 25 S.D.L.Rev. 372 (1980).

Accordingly, petitioner's application for a writ of habeas corpus is denied.

This decision constitutes the Court's findings of fact and conclusions of law pursuant to F.R.C.P. 52.

Done and entered at Sioux Falls, South Dakota, this 10th day of April, 1981.

BY THE COURT:

Fred J. Nichol

Senior District Judge

APPENDIX

FOR FOR USE IN APPLICATIONS

FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

NORMAN STUMES
Name

17533
Prison Number

South Dakota State Penitentiary, P. O. Box 911,

Sioux Falls, South Dakota 57101
Place of Confinement

United States District Court
District of South Dakota

Case No. _____
(To be supplied by Clerk of U.S. District Court)

NORMAN STUMES, PETITIONER
(Full name) (Include name under which you were convicted)

V.

HERMAN SOLEM, Warden of the South Dakota State Penitentiary, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF South Dakota, MARK V. MEIERHENRY, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

INSTRUCTIONS--READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is Clerk of Court, U.S. District Court, 400 South Phillips Avenue, Sioux Falls, South Dakota 57102.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack First Judicial Circuit Court, Union County, South Dakota.

2. Date of judgment of conviction March 23, 1974.

3. Length of sentence Life

   Sentencing judge Hon. Wayne Christensen

4. Nature of offense or offenses for which you were convicted: First Degree Manslaughter

5. What was your plea? (Check one)
   (a) Not guilty (x)
   (b) Guilty ( )
   (c) Nolo contendere ( )
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____
   _____
   _____
   _____

6. Kind of trial: (Check one)
   (a) Jury (x)
   (b) Judge only ( )

7. Did you testify at the trial? Yes (x) No ( )

8. Did you appeal from the judgment of conviction?
Yes (x) No ( )

9. If you did appeal, answer the following:
(a) Name of court South Dakota Supreme Court
(b) Result Remanded for further proceedings
(c) Date of result May 6, 1976
If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes ( ) No (x)

11. If your answer to 10 was "yes", give the following information:
(a) (1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )
(5) Result _____.
(6) Date of result _____.

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:
(1) First petition, etc. Yes ( ) No ( )
(2) Second petition, etc. Yes ( ) No ( )
(3) Third petition, etc. Yes ( ) No ( )

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____
_____
_____
_____
_____

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds

for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which has unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Certain alleged admissions of Petitioner were admitted at trial in violation of constitutional rights.
Supporting FACTS (tell your story briefly without citing cases or law): Petitioner was in custody in Green Bay, Wisconsin. Police officers from Sioux Falls, South Dakota came there to return him to Sioux Falls, South Dakota. Prior to going to Green Bay, Police Officers were advised by attorney who was representing Petitioner that he did not want them to talk to him. However, at Green Bay jail and on return trip to Sioux Falls, Police questioned Petitioner regarding the death of Joyce Hoff and allegedly obtained certain admissions against interest which were admitted over Petitioner's objection at trial.

B. Ground two: Certain physical evidence was admitted at trial which lacked

proper foundation and therefore violated Petitioner's constitutional rights.

Supporting FACTS (tell your story briefly without citing cases or law): Certain physical evidence was admitted at the trial over Petitioner's objection, for which there was a break in the chain of custody.

C. Ground three: Instruction regarding first degree manslaughter and verdict thereon regardless of fact that they were not supported by record as a whole.

Supporting FACTS (tell your story briefly without citing cases or law): The Court instructed the jury on first degree manslaughter and the jury returned a verdict thereon although the record, as a whole, would not support such instruction or verdict.

D. Ground four: _____

_____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

_____

_____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

_____

_____

_____

_____

_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (x)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    (a) At preliminary hearing Joe W. Cadwell, Attorney at Law, 125 West 10th Street, Sioux Falls, South Dakota.
    (b) At arraignment and plea Joe W. Cadwell, Attorney at Law, 125 West 10th Street, Sioux Falls, South Dakota.
    (c) At trial Joe W. Cadwell, Attorney at Law, 125 West 10th Street, Sioux Falls, South Dakota.
    (d) At sentencing Joe W. Cadwell, Attorney at Law, 125 West 10th Street, Sioux Falls, South Dakota.
    (e) On appeal Joe W. Cadwell, Attorney at Law, 125 West 10th Street, Sioux Falls, South Dakota.
    (f) In any post-conviction proceeding _____.
    (g) On appeal from any adverse ruling in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ( ) No (x)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (x)

(a) If so, give name and location of court which imposed sentence to be served in the future: U.S. federal district court for the District of South Dakota, Southern Division.

(b) And give date and length of sentence to be served in future: Nov. 1, 1976, 3 years consecutive.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No (x) Appealed to Eighth Circuit Court of Appeals, has since been heard and decided.

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Sioux Falls, South Dakota, Minnehaha County.

Wherefore Norman Stumes being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

/s/ Norman Stumes
(Signature)

Subscribed and sworn before me this 30 day of April, 1977.

Edward J. Leahy
Notary Public
or other person authority to administer an oath

/s/ Edward J. Leahy
Signature of Attorney
(if any)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

NORMAN STUMES, Petitioner v. HERMAN SOLEM, as the duly appointed and qualified Warden of the South Dakota State Penitentiary, Respondent.	CIV. 77-4049 PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE FRED J. NICHOL, CHIEF JUDGE OF THE FEDERAL DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA:

The Petitioner, Norman Stumes, respectfully alleges to this Honorable Court:

I.

That your Petitioner is confined in the South Dakota State Penitentiary at Sioux Falls, County of Minnehaha, State of South

Dakota, of which Respondent, Herman Solem, is the Warden.

II.

That your Petitioner is being unjustly and unlawfully restrained of his liberty and detained under color of authority of the State of South Dakota in the custody of the above named Respondent contrary to, and in violation of the Constitution of the United States of America.

III.

That the facts and circumstances concerning the unlawful restraint on Petitioner's liberty are as follows:

(A) That on or about September 17, 1973, Joyce Hoff was discovered in her apartment in Sioux Falls, South Dakota, the apparent victim of a homicide. Thereafter, on or about September 27, 1973, Petitioner was taken into custody in Green Bay, Wisconsin.

Two detectives of the Sioux Falls, South Dakota, Police Department and a Minnehaha County, South Dakota, Deputy Sheriff went from Sioux Falls to Green Bay to return Petitioner to South Dakota. Prior to their leaving for Green Bay, an attorney, who the detectives knew was representing the Petitioner, advised one of the detectives that he had been in telephone contact with Petitioner in Wisconsin and that he had advised him not to talk.

On October 1, 1973, Petitioner was questioned by the police officers in the Brown County, Wisconsin, Sheriff's office. At that time, Petitioner allegedly made certain admissions against interest relative to his whereabouts on the evening of Joyce Hoff's death. During the conversation he stated that he did not want to answer any further questions until he had talked with

his attorney. Later that same day, two officers returned to the jail and continued questioning Petitioner. During that conversation, Petitioner again allegedly made certain admissions against interest after which he again stated that he did not want to answer any further questions until he had talked with his attorney.

The following day, Petitioner was placed in a car with the three police officers and returned to Sioux Falls, South Dakota. During that return trip, and in response to further questioning of the police officers, he again allegedly made certain admissions against interest.

(B) Prior to trial of this matter, a hearing was held on February 14, 1974 in which the Defendant moved to suppress the statements or admissions against interest that were allegedly made by the Defendant.

Thereafter, the Court denied the Petitioner's Motion. No formal order was entered by the Court as contemplated by South Dakota Codified Laws 15-6-7(b).

(C) On March 19, 1974, immediately prior to trial, Petitioner again moved the Court to suppress the in custody statements alleged to have been made by Petitioner on October 1, 1974 and October 2, 1974. That Motion was again denied.

(D) During the course of the trial, the Court entered into evidence, over Petitioner's objection, certain exhibits for which there was a lack of foundation. The evidence improperly admitted consisted of certain physical evidence for which there was a break in the chain of custody.

(E) At the close of the trial, the Court instructed the jury relative to the

charge of first degree manslaughter, regardless of the fact that the record of the trial, as a whole, would not fairly support such a factual determination.

(F) On the 27th day of March, 1974, the aforementioned Court entered Judgment in this matter, pursuant to the jury verdict rendered on March 23, 1974 wherein Petitioner was convicted of first degree manslaughter committing the Petitioner to imprisonment in the South Dakota State Penitentiary situated in Sioux Falls, County of Minnehaha, State of South Dakota, at hard labor, for the full term and period of the rest of his natural life.

(G) Petitioner perfected his appeal to the South Dakota Supreme Court on April 11, 1974.

(H) On May 6, 1976, the South Dakota Supreme Court rendered its decision on that

appeal which is found at 241 NW 2d 587. In that decision, the South Dakota Supreme Court remanded the case to the trial court for Findings of Fact and Conclusions of Law relative to the suppression hearing held on the Petitioner's alleged admissions against interest. In so remanding, the South Dakota Supreme Court stated that if the admissions admitted into evidence were found to be involuntary a new trial should be granted, however, if all statements admitted were found to be voluntary, the Judgment should be affirmed.

(I) On October 18, 1976, the trial Judge entered Findings of Fact and Conclusions of Law wherein it was found that the alleged admissions by Petitioner were made voluntarily. Thus, a new trial was not granted and the decision of the trial court was thereby affirmed by the South Dakota Supreme Court.

IV.

Petitioner submits that the admission of the alleged statements made by Petitioner, the admission of certain physical evidence and the finding that sufficient evidence existed to support the instruction regarding first degree manslaughter and the guilty verdict thereunder constituted a denial of due process and right to counsel guaranteed by the Constitution of the United States. (See Brewer v. Williams, 45 USLW 4287, March 23, 1977)

V.

That Petitioner has exhausted all necessary remedies available to him under the laws of the State of South Dakota in an effort to secure a prompt determination of his constitutional claims.

VI.

That no previous application for the relief prayed for herein has been made to this Court.

WHEREFORE, your Petitioner prays as follows:

1. That this Court issue its Order requiring the Respondent, or whomever the Court shall designate, to appear before this Court and show cause, if any he has, why a Writ of Habeas Corpus should not issue directing that the Petitioner be discharged by Respondents from further custody and restraint.

2. For such other and further relief as the Court may deem just and equitable in the premises.

/s/ Norman Stumes

Norman Stumes, Petitioner

State of South Dakota)
:
County of Minnehaha)

Norman Stumes, being duly sworn, deposes and says: That he is the Petitioner above

named. That he has read the foregoing Petition and knows the contents thereof. That the same is true of his own knowledge and as to those matters he believes it to be true.

/s/ Norman Stumes

Norman Stumes, Petitioner

Subscribed and sworn to before me
this 30th day of April, 1977.

/s/ Edward J. Leahy

Notary Public, South Dakota

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

NORMAN STUMES, Petitioner, v. HERMAN SOLEM, as the duly appointed and qualified Warden of the South Dakota State Penitentiary, Respondent.	)	CIVIL NO. 77-4049 RETURN TO WRIT

COMES NOW the State of South Dakota, and says:

1. The State admits the allegations made in the answers to questions one through nine, inclusive, in the Petitioner's Petition.

2. The State denies the allegations made in Part A of question twelve of the Petition.

3. The State denies the allegations made in Part B of question twelve of the Petition.

4. The State denies the allegations made in Part C of question twelve of the Petition and affirmatively states that the Petitioner is not alleging grounds upon which habeas corpus relief may be granted.

5. Pursuant to Rule 5 of 28 U.S.C. 1 2254, the State says:

> (1) To the best of the State's knowledge, the Petitioner has exhausted his State remedies.
> (2) The State has in its possession on this date, the original Court file which contains the following transcripts:
> 1) the arraignment of October 26, 1973;
> 2) preliminary hearing of October 18, 1973;
> 3) hearing of January 3, 1974, on a motion for an order to produce documents, tangible objects and scientific tests;

4) hearing of February 14, 1974, on motion to suppress alleged admissions against interests made by the Defendant;

5) hearing of February 27, 1974, on a motion for a change of venue;

6) hearing of March 4, 1974, on motion to add the names of four witnesses;

7) hearing of March 5, 1974, on application to add co-counsel;

8) hearing of March 6, 1974, on motions for psychiatric evaluation of Defendant, taking statements of witnesses and the State's assistance in locating witnesses;

9) jury trial of March 19, 20, 21, 22 and 23 of 1974, and;

10) sentence on March 27, 1974.

(3) That attached to this return and made a part hereof, are the following documents which are incorporated into this return and made a part of the same as though the same were fully set out:

1) copies of portions of the transcripts deemed by the State to be relevant;

2) a copy of the Petitioner's brief, and;

3) a copy of the opinion of the South Dakota Supreme Court in this case.

WHEREFORE, Respondent asks that the petition for habeas corpus be denied.

Dated at Pierre, South Dakota, on this 12 day of July, 1977.

Respectfully submitted,

WILLIAM J. JANKLOW
ATTORNEY GENERAL

/s/ B. Elizabeth Godtland

B. Elizabeth Godtland
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501
Telephone: (605) 224-3215

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the State's Return to Writ of Habeas Corpus in the case of Norman Stumes v. Herman Solem, Acting Warden was served by United States mail, postage prepaid, upon Edward J. Leahy at 412 West Ninth Street, Sioux Falls, South Dakota 57104 on this 12 day of July, 1977.

/s/ B. Elizabeth Godtland

B. Elizabeth Godtland
Assistant Attorney General

[State Supreme Court decision, State v. Stumes, 90 S.D. 382, 241 N.W.2d 587 (1976), was attached to Return but not attached here because it is reproduced elsewhere in this Appendix. Portions of state trial transcript were also attached to the Return, but one omitted here.]

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

NORMAN STUMES, Petitioner,	)	CIV 77-4049
v.	)	ORDER
HERMAN SOLEM, Warden, South Dakota State Penitentiary, Respondent.	)	

The Petitioner having sought a writ of habeas corpus pursuant to 28 U.S.C. §2254, and the Court having made and entered its Memorandum Decision in the above-entitled matter on the 10th day of April, 1981, the Court hereby adopts its Memorandum Decision as the findings of fact and conclusions of law in this matter pursuant to Federal Rules of Civil Procedure, Rule 52, and incorporates the Memorandum Decision by referencing this Order. Accordingly, it is

ORDERED that Petitioner's application for writ of habeas corpus be denied.

Done and entered at Sioux Falls, South Dakota this 5th day of May, 1981.

BY THE COURT:
/s/ Fred J. Nichol

Senior Judge

ATTEST:

/s/ William F. Clayton

Mr. William F. Clayton, Clerk
by

/s/ Nancy A. Erickson

Deputy

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

NORMAN STUMES, Petitioner,	)	CIV 77-4049
v.	)	MOTION ON REQUEST FOR STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT
HERMAN SOLEM, Respondent.	)	

The State of South Dakota hereby requests this Court to issue a Stay in the above case until the request for Writ of Certiorari, which has been filed with the United States Supreme Court has been acted upon. Under 28 U.S.C. 2102(f) such a stay may be granted by a judge of the court rendering the judgment. Since the Eighth Circuit Court of Appeals has issued its mandate, this case is now within the sole control of this Court.

Dated this 26 day of April, 1982.

/s/ Judith A. Atkinson

Judith A. Atkinson
Assistant Attorney General
State Capitol
Pierre, SD 57501-5090
Telephone: (605) 773-3215

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

NORMAN STUMES, Petitioner,	)	CIV 77-4049
v.	)	ORDER
HERMAN SOLEM, ET AL. Respondent.	)	

This case came before the court on May 10, 1982, at 10 a.m. The Petitioner Norman Stumes was present and represented by counsel, Timothy J. McGreevy, and the Respondent was represented by counsel, Judith A. Atkinson of the Attorney General's Office, State of South Dakota.

The Respondent requested this Court to stay the execution and enforcement of judgment entered in this case until the Request for Certiorari to the Eighth Circuit Court

of Appeals can be ruled on by the United States Supreme Court. The Petition by Respondent was mailed to the United States Supreme Court on April 30, 1982. The request for this stay is made under 28 U.S.C. 2101(f). After a hearing on the matter it is

ORDERED that a stay of execution of the mandate of the Eighth Circuit Court of Appeals is granted until the United States Supreme Court either has granted a Writ of Certiorari and heard the case, decided it, and issued its mandate or until the United States Supreme Court has denied the request for a Writ of Certiorari.

Dated this 12th day of May, 1982.

/s/ Fred J. Nichol

Fred J. Nichol
Senior Judge
United States District Court

ATTEST:

/s/ William F. Clayton

Clerk
By: /s/ Nancy Hanson, Deputy

[Certificate of Service omitted in printing]

STATE OF SOUTH DAKOTA) In the Circuit Court thereof,
: ss. Second Judicial Circuit.
County of Minnehaha) SEPTEMBER Term, A.D., 1973

THE STATE OF SOUTH DAKOTA,)
) CIV 73-106
v.) Information for Murder
NORMAN STUMES,)
Defendant.)

GENE PAUL KEAN, States Attorney of the County of Minnehaha, in the name of, and by authority of the State of South Dakota, informs the Court: That NORMAN STUMES on or about the 17th day of September, 1973 in the County of Minnehaha and State of South Dakota aforesaid then and there did wilfully, unlawfully, feloniously, without authority of law and with a premeditated design to effect the death of one Joyce Hoff, a human being, did kill the said Joyce Hoff, and the said Defendant did then and there, and by said means, commit the crime

of murder in violation of the provisions of SDCL 22-16-4, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

/s/ Gene Paul Kean

States Attorney of the County of Minnehaha, State of South Dakota

STATE OF SOUTH DAKOTA,)
) ss.
County of Minnehaha)

GENE PAUL KEAN, being first duly sworn, deposes and says that he is the States Attorney of the said County of Minnehaha; that he has read the foregoing information and knows the contents thereof, and that the same is true of his own best knowledge, information and belief.

/s/ Gene Paul Kean

States Attorney of the
County of Minnehaha,
State of South Dakota.

Subscribed and sworn to before me this 26th day of October, 1973.

/s/ Myrna L. Ford

Notary Public,
Minnehaha County,
South Dakota

[SEAL]

Myrna L. Ford, Notary Public
My Commission Expires
April 18, 1980

WITNESSES KNOWN TO STATES ATTORNEY
AT TIME OF FILING THIS INFORMATION

Robert Dysart
Mary Doornewerd
Kathy Doman
Dr. Richard Schultz
Donald Thomas
Sherman O. Aase
James Lund
Susan Hirsch
Don Skadsen
James Green
Ken Headrick
Rosemary DeCock
Robert Johnson
Dennis Gustafson
Beverly Hoff
Lt. Milton Steno
Sgt. Fields
Harlan Hinders
Francis Konda
Ray Cuccaro
Howard Larson
FBI Agent - Blood Detection Lab
FBI Agent - Hair Detection Lab
Lt. Merle Renli
Dr. Jose Crespo
Dr. Wesley Putnam
Mike Scholdberg (FBI)
Eugene Horst
Gene Gruhlke
Irene Twedt

The State of South Dakota
v.
NORMAN STUMES

INFORMATION FOR MURDER
Filed October 26, 1973, Minnehaha County, S.D.
Roger D. Moan
Clerk of Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT	
THE STATE OF SOUTH DAKOTA, Plaintiff, vs. NORMAN STUMES, Defendant.	)	CRI. 73-106 MOTION TO SUPPRESS STATEMENTS

Defendant moves to suppress as evidence herein all written and oral statements made by him on the following grounds:

1. That the statements were obtained in violation of defendant's privilege against self incrimination and his right to counsel as guaranteed by 5th, 6th and 14th Amendments to the United States Constitution.

2. Further grounds for the suppression of the statements will be developed at the time of the hearing of this motion. It

is noted that the State has represented to the court that they have no written statements or memorandum concerning oral statements before or during the time he was in custody and therefore this motion refers to the testimony of police officer Skadsen and Green and Deputy Sheriff Headrick.

WHEREFORE, defendant respectfully requests this court to suppress as evidence the oral statements made by him.

Dated this 22nd day of January, 1974.

/s/ Joe W. Cadwell

BRAITHWAITE & CADWELL
Attorneys for Defendant
125 West 10th Street
Sioux Falls, SD 57102

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
)
Plaintiff,) CRI. 73-106
)
vs.) MOTION TO SUPPRESS EVIDENCE
)
NORMAN STUMES,)
)
Defendant.)

The defendant, Norman Stumes, moves by his attorney, Joe W. Cadwell, for an Order suppressing all evidence, oral or tangible, obtained directly or indirectly from:

(a) The search warrant dated September 18, 1973 issued by the Judge of the Municipal Court, City of Sioux Falls, the search and seizure pursuant to same being in violation of defendant's rights under the 4th Amendment of the United States Constitution.

(b) The search warrant dated October 4, 1973 issued by the Municipal Judge, City of Sioux Falls, the said search and seizure made pursuant to same being in violation of the defendant's rights under the

4th Amendment to the United States Constitution.

(c) The search and seizure of property from the premises in the defendant's YMCA room at Green Bay, Wisconsin, said search and seizure being in violation of defendant's rights under the 4th Amendment to the United States Constitution.

As grounds for this Motion, counsel for the defendant states:

1. That the search warrant was issued without a showing of probable cause to believe that the defendant had committed the felony alleged in the respective affidavits upon which the subject search warrants were issued.

2. That following his arrest, defendant was placed in the Green Bay jail and held for questioning by police officers of the Sioux Falls Police Department. [In the State trial court record this page is attached to the Motion to Suppress Statements. It appears that the trial court made

error in attaching this page to the Motion and that it should be properly attached to Motion To Suppress Evidence; the first page of it is included in this Appendix.] The nature of the questioning and the premises made therein, without counsel, make the statements made by the defendant involuntary and the result in violations of the 4th, 5th and 6th Amendments to the Constitution of the United States.

3. Said seizures were unlawful because:

a. Each was made pursuant to a warrant and affidavit relying on previously illegally obtained evidence;
b. Each war made pursuant to a warrant and affidavit which did not allege fact sufficient to support belief that defendant had participated in the alleged crime.
c. Each was made pursuant to a warrant which did not particularly describe "things to be seized", and hence involved taking of property not authorized by a magistrate;

4. That the evidence obtained pursuant to said search warrants lack probative value and their introduction would be purely for the purpose of prejudicing the defendant and are not material to the issues of defendant's guilt or innocence.

WHEREFORE counsel respectfully prays that the court order the supression of all evidence resulting from the aforesaid searches and seizures alleged herein.

Further defendant requests a pre-trial hearing on the suppression of the aforesaid matters, all of which would be prejudicial to the defendant if they came in any way before the jury at the trial of the matter.

Dated this 22nd day of January, 1974.

/s/ Joe W. Cadwell

BRAITHWAITE & CADWELL
Attorneys for Defendant
125 West 10th Street
Sioux Falls, SD 57102

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

THE STATE OF SOUTH DAKOTA,
Plaintiff,
vs.
NORMAN STUMES,
Defendant.

CRI: 73-106
AFFIDAVIT OF ATTORNEY IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

Joe W. Cadwell being first duly sworn, deposes and says:

I am the attorney for the defendant in the above entitled proceedings; defendant advised me that he was arrested on or about the 27th day of September, 1973.

At the time of defendant's arrest and shortly thereafter he was interrogated by detectives of the Green Bay Police Force, the Sioux Falls Police Force, and other persons unknown to him.

That said arrest and detention and interrogation were in violation of defendant's Constitutional rights.

At the time of the arrest, defendant was very disturbed mentally and emotionally and that that condition continued at all times material and including the time he was in Green Bay, Wisconsin until after he was returned to the Minnehaha County Jail.

I am informed that the defendant made certain incriminatory statements.

That at the time of his arrest and interrogation prior to two or three days after his return to the Minnehaha County Jail, that defendant was not duly informed and granted his right to counsel and his Constitutional right to stand mute and that statements obtained constituted the fruit of unlawful interrogation in violation of defendant's Constitutional rights guaranteed

under the 5th, 6th and 14th Amendment to the United States Constitution under the circumstances existing.

I believe that the defendant was denied his rights in derogation of the United States Constitution and Constitution of the Laws of the State of South Dakota.

Dated this 22nd day of January, 1974.

/s/ Joe W. Cadwell

Cheri Wiese
Notary Public
Commission Expires April 1, 1980

/s/ Cheri Wiese

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA,	*	CR. 73-106
v.	*	ANSWER TO AFFIDAVIT AND MOTION TO
NORMAN STUMES,	*	SUPPRESS STATEMENTS
Defendant.	*	

* *

Comes now the State of South Dakota through the Minnehaha County State's Attorney and states as follows:

1. Denies that any of the statements obtained from the Defendant were in violation of his constitutional and statutory rights under the United States Constitution, the South Dakota Constitution or the South Dakota Compiled Laws.

2. That the alleged representation made by the State that it had no written statements or memoranda concerning oral

statements of the Defendant is misstated by the Defendant in his Motion to Suppress, and in fact the Plaintiff through the Minnehaha County State's Attorney has furnished all known written statements or memoranda to the Defendant.

WHEREFORE,, the Plaintiff would respectfully request this Court to deny the Defendant's Motion to Suppress Statements.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 14th day of February, 1974.

/s/ Gene Paul Kean

State's Attorney
Minnehaha County, SD

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF UNION) FIRST JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA *

vs. * ORDER DENYING

NORMAN STUMES, * MOTION TO SUPPRESS

Defendant. *

****

Based upon the Findings of Fact and Conclusions of Law entered by the Court upon the day of this order,

IT IS HEREBY ORDERED that the Defendant's motion to suppress all statements made to law enforcement officials is hereby denied in all respects for the reasons set forth in the Court's conclusions of law.

Dated at Sioux Falls, Minnehaha County, South Dakota this 18th day of October, 1976.

/s/ Wayne W. Christensen
Judge

ATTEST:

/s/ Marlene M. Johnson

By: _____
Deputy

FILED

October 19, 1976

Marlene M. Johnson
Clerk of Courts
Union County, South Dakota

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF UNION) FIRST JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA, * CR. #74-11

vs. * FINDINGS OF FACT and

NORMAN STUMES, * CONCLUSIONS OF LAW

Defendant. *

****

(The following findings of fact and conclusions of law are made pursuant to the order set forth in the case of State vs. Stumes, 241 N.W. 2d 587 (S.D. 1976).)

This matter having come on for hearing before the Court on the 14th day of February, 1974, the Honorable Wayne W. Christensen presiding, at the hour of 9:00 A.M. in the courtroom of the Minnehaha County Courthouse; and the State being represented by Gene Paul Kean, States Attorney of Minnehaha County, and the Defendant

appearing in person and with his counsel, Joe W. Cadwell, and the Court having heard the testimony of all witnesses called by the State together with the testimony of the Defendant himself, and the Court having heard all of the other evidence introduced herein, and the Court being requested upon motion of the Defendant to decide the question of voluntariness of statements made by the defendant to law enforcement officials, and the Court having further considered all the records and files herein, now therefore, the Court adopts the following findings of fact for the purposes of this hearing.

FINDINGS OF FACT

1. The Defendant in this case is Norman Stumes.

2. Joyce Hoff was found dead in her apartment on September 17, 1973 under circumstances which led law enforcement personnel to believe a homicide has been

committed. During the course of the investigation of the case, the Defendant became a suspect and was sought by the police for questioning.

The Defendant was eventually located in Green Bay, Wisconsin. On September 30, 1973. Detectives Skadsen and Green of the Sioux Falls Police Department flew to Green Bay to bring the Defendant home on unrelated charges of perjury and bad checks, both felonies. During this time the Defendant was in custody at the Brown County, Wisconsin jail in Green Bay.

4. On the morning of October 1, 1973, Detective Green met the Defendant at the County jail. Prior to conversing with him he read the Miranda warnings to him and the Defendant stated at this time he understood the rights as read. During this conversation the Defendant admitted being at Joyce Hoff's apartment on the night of her death.

At one point while they were talking the Defendant stated he did not wish to continue the conversation. Immediately, Detective Green ceased this discussion, but told the Defendant he would see him later that afternoon.

5. Later on October 1, 1973, after a lapse of about four and one-half hours, both Skadsen and Green went to the Green Bay police department to see the Defendant. Most of the conversation was handled by Skadsen. Toward the end of this one-half hour interview Detective Green asked only one question; that being whether the death of Miss Hoff was intentional or accidental, to which the Defendant replied it was accidental. Again at this point in time the Defendant said he did not want to converse until he talked to his attorney. The conversation ceased immediately.

6. Prior to departing from Sioux Falls to Green Bay, Detective Green had met Attorney Steve Jorgenson who was representing the Defendant on other criminal matters. Jorgenson had talked to Stumes by phone when the Defendant was in Green Bay and he told Green he didn't want them talking to him, but, if he did, there was nothing he could do about it.

7. The next morning, October 2, 1973, Skadsen and Green together with Minnehaha County Deputy Sheriff Ken Headrick, who had driven to Green Bay to transport all the parties home, met the Defendant at the Brown County Jail. This was after the Defendant had eaten breakfast. Before beginning the return trip home the Defendant was given the Miranda warnings a second time. He again stated that he understood these rights. During the trip home the Defendant began crying and made the statement, "Taking a

human life is so useless." Soon after and during portions of the remaining trip home, the Defendant told of some of the details surrounding the death of Joyce Hoff. The Defendant further indicated that he would sign a confession upon arriving home even if he had to do so against the advice of his attorney. After his arrival at the Minnehaha County jail the Defendant told Skadsen that he wanted him to know he was not a vicious killer and that the death was accidental. At no time during the trip home did the Defendant ever express a desire to remain silent or exercise any of the other Miranda rights.

8. The Defendant testified at the hearing that he had been under the influence of drugs at all times when he was being questioned, although he does not deny that the rights were given as Detectives Skadsen and Green stated.

9. Both Detective Skadsen and Green testified that in their opinion, and based upon their observations of the Defendant, he appeared to be normal during all of the interviews. Also, the Defendant was fed upon the return trip from Green Bay.

Based upon the foregoing findings of fact, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. This court has jurisdiction to hear the matter brought before it upon Defendant's motion.

2. From the totality of all the circumstances surrounding this case, the Court concludes further that:

(a) The Defendant received the proper Miranda warnings on each occasion, before any interrogation, and each was read in an intelligent manner which the Defendant indicated he understood.

(b) The accused was not subject to any physical abuse, threatened physical harm, threats to his family or any psychological coercion by threats of potential harm or promises of harm or leniency.

(c) All statements given by the Defendant were done so freely and voluntarily and the Defendant was fully aware of the consequences of his waiver and any statements so made.

(d) The Defendant is found to be in good health, capable of understanding what was stated to him and was not suffering from any mental condition which would affect the voluntariness of the statements he made.

3. It is specifically found by the Court that the State of South Dakota has met its burden of proof beyond a reasonable doubt by showing that the Defendant knowingly, voluntarily, and intelligently waived

his request for counsel and any other Constitutional right which he possessed at the time when he gave incriminating statements to any law enforcement officers.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 18th day of October, 1976.

BY THE COURT:

/s/ Wayne W. Christensen
Judge

ATTEST:

/s/ Marlene M. Johnson
~~ROGER D. MOAN~~, Clerk

By: _____ Deputy

Filed
October 19, 1976
Marlene M. Johnson
Clerk of Courts
Union County, South Dakota

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF UNION) FIRST JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA,

v. JUDGMENT

NORMAN STUMES,

Defendant.

* *

At a regular term of the Circuit Court within and for the County of Union, in the First Judicial Circuit of the State of South Dakota, held at the court house in the City of Sioux Falls, in Minnehaha County and Second Judicial Circuit, on the 27th day of March, 1974;

Present the Honorable Wayne W. Christensen, Presiding Judge, and the officers of said Court.

AN INFORMATION having been duly filed in the Second Judicial Circuit, Minnehaha

County, South Dakota, by Gene Paul Kean, the States Attorney of Minnehaha County, on the 26th day of October, 1973, charging said Defendant with the crime of murder, and said Defendant having been duly arraigned upon the said Information on the 26th day of October, 1974, Joe W. Cadwell, Court Appointed Attorney, appearing as Counsel for said Defendant upon such arraignment said Defendant having duly entered in open Court his oral plea of not guilty of the charge in said Information contained; and said cause having been regularly brought on for trial upon the issue joined therein in the First Judicial Circuit, County of Union, Elk Point, South Dakota, Joe W. Cadwell, appearing as counsel for said Defendant and Gene Paul Kean. State's Attorney in and for Minnehaha County, South Dakota, appearing

for the prosecution, before the Court and a jury duly and legally impanelled and sworn on the 19th day of March, 1974, to try said cause and the jury having heard the evidence adduced on behalf of the State of South Dakota, and on behalf of said Defendant and having on the 23rd day of March, 1974, returned into open Court, in the presence of said Defendant, their oral verdict "we the jury, find the Defendant, Norman Stumes, guilty of first degree manslaughter," the Court thereupon appointed the 27th day of March, 1974, as the time for pronouncing judgment.

And now, March 27, 1974, being the time appointed for judgment herein, the said Defendant appeared for judgment, and with Joe W. Cadwell, Counsel; and thereupon the said Defendant was informed by the Court of the nature of the Information, of his plea, and the verdict therein, and was asked by

the Court whether he had any legal cause to show why judgment should not be pronounced against him; There being no sufficient cause the Court thereupon pronounced the following judgment and

SENTENCE

AND NOW, March 27, 1974, the Court being fully advised in the premises, it is by the court considered, ordered and adjudged, that you

NORMAN STUMES

be imprisoned in the South Dakota State Penitentiary situated in Sioux Falls, County of Minnehaha, and State of South Dakota, at hard labor, for the full term and period of the rest of your natural life, there to be kept, fed and clothed, according to the rules and discipline governing the said South Dakota State Penitentiary.

And it is further ordered that you stand committed to the custody of the Sheriff of Minnehaha County, South Dakota, pending the execution of this judgment.

Done in open Court,

BY THE COURT

/s/ Wayne W. Christensen

Judge

ATTEST:
MARLENE JOHNSON, Clerk

By: /s/Neva Neal

Deputy